CHEW SOO LAN v. LUDHIANA TRANSPORT SYNDICATE & ANOR.

[F.C. (Gill C.J. (Malaya), Ali and Wan Suleiman F.JJ.) July 19, 1976]

[Kuala Lumpur — Federal Court Civil Appeal No. 169 of 1975]

Tort — Negligence — Appeal — Finding of trial judge — Case not decided wholly on oral testimony — Whether appellate court can interfere with finding of fact — Absence of cogent and reliable evidence — Liability apportioned equally.

This was an appeal from the decision of the decision of Ajaib Singh J. in which he found that the accident in this case was due entirely to the fault of the driver of the car in which the deceased was travelling and he therefore dismissed the claim brought by the widow and executrix of the deceased.

Held, allowing the appeal: (1) the learned judge's finding was not based entirely on the demeanour of the witnesses as they gave evidence and therefore the appellate court was in as good a position or as bad a position as the trial judge to form a view as to what happened;

(2) the learned judge clearly did not decide the case wholly on the oral testimony of the witnesses and nothing very much turned on the evidence as regards the mark on the road or the piece of glass on the grass verge on the side of the road. The balance of probability therefore was in favour of the view that the drivers of both vehicles were to blame and that it was impossible to say in what proportion the blame should be allocated between them;

(3) in the circumstances it would not be unreasonable to apportion the liability equally between the drivers of the two vehicles and therefore judgment should be given for the plaintiffs for half of the damages awarded.

Cases referred to:—

(1) *Foong Yit Voon* v. *Yap Thian & Anor.* [1963] M.L.J. 104, 108.

(2) *Yahaya Mohamed* v. *Chin Tuan Nam* [1975] 2 M.L.J. 117, 123.

FEDERAL COURT.

Foo Sam Ming (*K. Sellar* with him) for the appellants.

N.H. Chan for the respondent.

Gill C.J. (Malaya) (delivering the judgment of the Court): This was an appeal by the plaintiffs from the dismissal by Ajaib Singh J. of their action against the respondents as defendants for damages arising out of the death of one Choong Tung Cheong in a motor accident on December 31, 1970. The action was brought by the plaintiffs in their capacity as administratrix and co-administrator of the estate of the said Choong Tung Choong deceased for the benefit of his widow and dependant children.

The deceased, a wholesale dealer in watches with a shop known as Sin Mah at 20 Oxley Road, Singapore, used to visit Malaysia once a month on business. On December 31, 1970 he arrived in Kuala Pilah at about 11 a.m. in a Mercedes Benz motor car bearing registration No. NB5522, travelling from Malacca via Tampin and Seremban. He had with him his only salesman named Chia Chah Hoo. After doing their business and collecting some money at Kuala Pilah the two of them left in the car for Seremban at about 12.10 p.m. Chia drove the car and the deceased sat beside him as a passenger. When they arrived at the 12½ milestone from Kuala Pilah their car came into collision with motor lorry ND1969 belonging to the first defendants and being driven by the second defendant as their servant or agent from the opposite direction, resulting in the deceased being killed and Chia being seriously injured.

In due course the plaintiffs issued a writ in the action against the defendants from the High Court at Seremban. In their statement of claim the plaintiffs alleged that the collision was caused solely by the negligence of the second defendant and they set out therein various particulars of such negligence. They further relied on the doctrine of *res ipsa loquitur*. The defendants by their statement of defence denied that the accident was caused by the negligence of the second defendant. They averred that the accident was caused solely or in the alternative contributed to by the negligence of the driver of the motor car NB5522, setting out the particulars of negligence on the part of the driver.

At the trial of the action Chia Chah Hoo (PW1) gave evidence on behalf of the plaintiffs as to how the accident took place. What he said was this. Just before the collision he was travelling on the left side of the road as one faces Seremban at about 35 m.p.h. It was raining at the time. He saw a lorry coming from the opposite direction. It was travelling very fast although he could not say at what speed it was travelling. When he first saw the lorry it was about 40 feet away. He could not see it earlier because of a bend in the road. On seeing the lorry he sounded his horn. He was still on his side of the road. Soon after that the lorry knocked against the front mudguard of his car on the driver's side. The collision took place on his side of the road. He could not say where the lorry stopped after the accident. The lorry came in a very fast manner. The accident took place within seconds. He took no evasive action because he was on his correct side of the road and there was a big drain on his left. He felt giddy after the accident. Later he and the deceased were taken to Kuala Pilah hospital.

Under cross-examination his evidence was as follows. He was familar with Seremban/Kuala Pilah Road. For a few miles before the place of accident there are a lot of bends on the Seremban side of the road. Coming from Kuala Pilah, for about 2 miles before the place of accident, there are some bends and also straight stretches of road. Just before the collision he was on his correct side. He could not go any further to the left because of the drain. The lorry encroached into his path. After the collision his car was on the left of his side facing Kuala Pilah.

In answer to questions put to him by the court PW1 stated as follows. There was a left bend in front. It was an "S" shaped bend. At the bend there is also a bridge — over a small river — a stream. He had not reached the bridge yet. The accident took place about 40 feet from the bridge. The bend was in front of him. The road behind him was not very straight — slightly curved. It was raining — not heavy rain, drizzling.

The evidence on behalf of the defence consisted of the evidence of the second defendant, Somanaidu s/o Bankariah (DW1), and that of the lorry attendant Soundaraju (DW2) who said that he did not know

how the accident took place as he did not see it because he was facing the rear. The second defendant's version as to what happened was as follows. On the day in question he drove lorry ND1969 from Petaling Jaya and was on his way to Bahau. He was carrying a nundred 45-gallon empty drums in the lorry. When he reached the 12½ milestone from Kuala Pilah he passed a bridge and saw a Mercedes Benz car coming from the opposite direction on to his side. On seeing this he swerved his lorry to his very left — to the left edge. The car then knocked into the front portion of his lorry and swung round facing the direction of Kuala Pilah. He was doing about 15 to 20 miles per hour because of the rain. He had been driving lorries along this road for about 12 years and was therefore familar with it. Two miles before the place of accident coming from Seremban there were many bends. The road after the place of accident towards Kuala Pilah was a straight stretch of road.

Under cross-examination he said that he arrived at the scene of the accident at about 12.30 p.m. His was a 6 ton lorry. He was used to this type of lorry. The drums were secured by ropes. Just before the scene the road was very winding. A slight mistake on his part would land him in the drain or hit a vehicle coming from the opposite direction. The road was quite narrow. He was on his correct side of the road within his own half. He did not agree that on approaching a bridge a vehicle like his ought to have stopped. He could see in front. He was not travelling fast. He denied that as a result of not stopping at the bridge he encroached on the other side. The front offside part of his lorry was damaged. When asked whether the other vehicle would be badly damaged because his was a heavy vehicle, he replied that he did not knock into the other vehicle. He said that he exercised extreme care and that the car came and knocked into his lorry.

In answer to a question put to him by the court he said that he made a report to the police on the same day at about 1.20 p.m. When it was put to him that he had made no mention in his report that the Mercedes Benz had encroached on to his path, he replied that he said that the car knocked into his lorry, by which he meant that the car encroached on his path.

On the evidence before him the learned trial judge held that the driver of the car in which the deceased was travelling was wholly to blame for the accident. In doing so he accepted the evidence of the lorry driver that after he had crossed the bridge the oncoming car encroached into his path and collided with the lorry. In stating in his grounds of judgment his reasons for arriving at the finding the learned judge said:

"The lorry had travelled along many bends immediately before reaching the bridge and could not have been travelling fast as alleged by the driver of the car. I accepted the evidence of the second defendant that on seeing the oncoming car encroaching into his path he swerved his lorry to the left edge of the road but the car knocked into the front portion of the lorry and swung around. On the other hand I did not accept the evidence of the driver of the car that it was the lorry which had encroached into his path. The road up to the place of the accident from Kuala Pilah side was a fairly straight stretch unlike the stretch of road from Seremban side up to the place of the accident. On a balance of probabilities I found that it was the driver of the car in which the deceased was travelling who was to be blamed for the accident."

It would seem clear that the learned judge made a finding that the lorry driver could not have been travelling fast because he had travelled along many bends immediately before reaching the bridge. With respect to the learned judge, he was speculating when he drew this inference on the evidence before him. There was no evidence that the lorry driver had either stopped or slowed down before going over the bridge and negotiating the bend. For him it was a right hand bend and it is common knowledge that there is a greater tendency for the driver of a vehicle to cut corners when negotiating such a bend. The fact that after the impact the car turned right round and landed on the left side of its road facing Kuala Pilah was highly indicative of the speed of the lorry. Had the lorry been driven at 15 or 20 miles per hour, as alleged by the driver, it would have been extremely unlikely for the car to have been swung right round. The lorry driver persisted in saying that it was the car which knocked into his lorry. The truth of course was that the two vehicles collided with each other. The lorry was a much heavier vehicle. The probability therefore was that the lorry was travelling faster than 15 or 20 miles per hour. In our judgment the learned trial judge did not consider the width and the weight of the lorry and of the car, and he made no allowance for the fact that the lorry had immediately before the accident crossed a narrow bridge.

The learned trial judge went on to state in his grounds of judgment:

"The scratch mark on the left side of the road shown on the sketch plan as one comes from Seremban is in between the two vehicles and nearer the lorry which in all probability indicates that the accident occurred on the lorry's side of the road. Also on the grass verge next to the lorry are shown glass fragments from the broken windscreen of the car. This tends to support the evidence of the driver of the lorry that he swerved his lorry to the very left edge of the road in attempting to avoid the oncoming car. As to the speed of the vehicles it was the car rather than the lorry which in all probability was travelling very fast because after knocking into the lorry which was on its correct side the car swung round and ended up facing the direction it had come. The car was approaching a bridge and then a bend ahead and it was also drizzling at that time. In these circumstances I held that the driver of the car had failed to exercise due care and attention by driving fast and encroaching into the other half of the road. I therefore held that the plaintiffs had failed to prove any negligence on the part of the defendants."

Again with respect to the learned judge, there was no evidence as to how the scratch mark on the road, as shown in the plan, came to be there. There certainly was no evidence that the scratch mark was made by the car. The learned judge's inference that the scratch mark in all probability indicated that the accident occurred on the lorry side of the road was therefore not supported by evidence. The finding of glass fragments on the grass verge next to the lorry could not be said to support the evidence of the lorry driver either that they were broken pieces of glass from the windscreen of the car or that the driver swerved his lorry to the left edge of the road in attempting to avoid the oncoming car. There was obviously such a violent impact between the two vehicles that pieces of glass would have been scattered all over. As the car was turned right round, starting from its off-side with the impact, the falling of pieces of glass,

even if they were from the windscreen of the car, all to the side of the lorry would not be a strange phenomenon. It would certainly not be something which would be inherently improbable.

The lorry driver did not say in his report to the police that the car had encroached on to his side of the road. His explanation for not doing that was that his report that the car knocked into his lorry meant that the car had encroached into his path. The driver of the car also made a report at about 9.30 p.m. on the date of the accident. In his report he clearly stated that the lorry had encroached on to his side of the road. In the circumstances the learned judge ought not to have accepted the explanation of the lorry driver as to why he had not specifically mentioned in his report that the car encroached on to his side.

It appeared to us from the learned judge's grounds of judgment that in arriving at his decision he did not consider the damage to both the vehicles. The damage was to the front offside of each vehicle. It was in evidence that the road at the place of the accident was rather narrow. Neither of the vehicles had gone off the road before the impact. The evidence before the learned judge was therefore clearly indicative of the fact that the accident took place at or very near the middle of the road.

Counsel for the respondents submitted to us that the learned judge had made a finding of fact after hearing the two versions of the accident, and that he had chosen to accept the evidence of the lorry driver. He also submitted that the pieces of glass and the scratch mark were on the lorry side of the road. As we have already said, neither the position of the scratch mark on the road nor the place at which the broken pieces of glass were found gave clear indication as to the point of impact. Moreover, the learned judge's finding was clearly not based entirely on the demeanour of the witnesses as they gave evidence. Therefore, to use the words of Thomson C.J. (as he then was) in *Foong Yit Voon* v. *Yap Thian & Anor.*,[1] in all the circumstances of the case we thought that we were in as good a position, or as bad a position, as the trial judge to form a view as to what happened.

It was stated by Lord Edmund-Davis in delivering the judgment of their Lordships of the Privy Council in *Yahaya Mohamad* v. *Chin Tuan Nam*[2] that the percentage of traffic accident cases which can be satisfactorily decided wholly independently of oral testimony must be very small. In this case, however, the oral testimony of the two witnesses was well-balanced. If anything, the evidence of the driver of the car was consistent with what he stated in his report to the police about the accident. The learned trial judge clearly did not decide the case wholly on the oral testimony of the witnesses. In our judgment nothing very much turned on the evidence as regards the mark on the road or the pieces of glass on the grass verge on the lorry side of the road. The balance of probability therefore was in favour of the view that the drivers of both vehicles were to blame and that it was impossible to say in what proportion the blame should be allocated between them.

One of the grounds of appeal on behalf of the appellants in this case was that the learned trial judge ought to have held that in the absence of cogent and reliable evidence on which he could come to a definite finding it would not be unreasonable to apportion the liability equally between the drivers of the two vehicles. We found ourselves in full agreement with that ground of appeal. We therefore allowed the appeal, setting aside the judgment of the court below and substituting in its place an order that the liability for the accident be apportioned equally between the two drivers. The learned judge assessed general damages on the basis of full liability at $42,628 and special damages were agreed at $1,515. We therefore gave judgment for the plaintiffs for half of those amounts together with interest as claimed and costs.

Appeal allowed.

Solicitors: *Foo & Woon; Chor Pee & Hin Hiong.*

RE CHOE KUAN HIM, ADVOCATE & SOLICITOR; T. DAMODARAN v. CHOE KUAN HIM

[F.C. (Suffian L.P., Ali and Wan Suleiman F.JJ.) August 20, 1976]

[Alor Star — Federal Court Civil Appeal No. 111 of 1975]

Legal Profession — Solicitor — Undertaking — Undertaking to pay balance of purchase money to vendors on registration of transfer of land — Lis pendens order registered against land — Solicitor offering to pay money to court.

In this case the respondent, an advocate and solicitor, was acting for both the purchasers and the vendors of a piece of land. He gave an undertaking to confirm that the balance of the purchase money had been deposited with them and that this would be paid to the vendors upon the transfer of the land being registered. The transfer was duly registered but in the meantime a *lis pendens* had been obtained and registered against the land. The respondent indicated that he would pay the money into court but the appellant, the vendor, applied for the payment of the money to him. The learned trial judge ordered that the money be paid into court but also ordered that the respondent should pay costs and interest at the rate of 12% per annum ([1975] 2 M.L.J. 274). The appellant appealed to the Federal Court and the respondent cross-appealed against the order for payment of costs and interest.

Held, (Suffian L.P. and Wan Suleiman F.J., Ali F.J. dissenting): (1) in the peculiar circumstances of this case the respondent should be allowed to release the money into court and not to the vendor — appellant;

(2) that in the circumstances costs in the court below and on appeal should be borne by the appellants and the respondent should only be ordered to pay interest at 6% per annum from the date of judgment.

Case referred to:-

Re a Solicitor, Ex parte Hales [1907] 2 K.B. 539.

The following authorities were also cited in argument: *In re H.A. Grey* [1892] 2 Q.B. 440, p. 443 4th line, p. 444, para. 2; *United Mining & Finance Corporation Ltd.* v. *Becher* [1910] 2 K.B. 296, 299, 300, 304; *Re a Solicitor* [1966] 3 All E.R. 52, 55; *Seah Choon Chye* v. *Saraswathy Devi* [1971] 1 M.L.J. 112; *Bank of Athens Societe Anonyme* v. *Royal Exchange Assurance* [1938] 1 K.B. 771; *Ballemy* v. *Sabine* (1857) 1 De G. & J. 797; 43 English & Empire Digest 1964 edition, p. 362, para. 3826.